

NOT FOR PUBLICATION

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS  
DIVISION OF ST. THOMAS AND ST. JOHN

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Criminal No. 2006-01
	)	
ROBERT PINNEY,	)	
	)	
Defendant.	)	
_____	)	

**Attorneys:**

**Delia Smith, AUSA**  
St. Thomas, U.S.V.I.  
*For the plaintiff,*

**Justin K. Holcombe, Esq.**  
St. Thomas, U.S.V.I.  
*For the defendant.*

**MEMORANDUM OPINION**

Before the Court is defendant Robert Pinney's ("Pinney") motion to suppress. Pinney seeks to suppress all statements made by Pinney while he was in custody. He also seeks suppression of all physical evidence seized during a search of his home. For the reasons stated below, the motion is denied in part and granted in part.

**I. FACTS**

On December 7, 2005, in an attempt to locate Pinney's cousin, Wayne Bruce Serieux ("Serieux"), DEA/HIDTA Agents Michael

Goldfinger, Eric Lee, and Darnell Blake went to Pinney's place of employment, K-Mart, to ask Pinney about Serieux's whereabouts. Serieux had been named in an arrest warrant in connection with a major drug organization. The agents had obtained Serieux's cell phone records which indicated he had been in telephone contact with Pinney.

When questioned by the agents, Pinney denied any contact with Serieux or any knowledge of his whereabouts. The agents advised him that making false statements to federal officers regarding the whereabouts of a fugitive is a crime.

On December 8, 2005, the agents contacted Sedonia Hunt ("Hunt"), Pinney's girlfriend, alleging her residence had made telephonic contact with Serieux's phone on December 6, 2005.<sup>1</sup> Pinney was at Hunt's residence when approximately five agents arrived. Pinney was again questioned about Serieux's whereabouts and he again denied having contact with Serieux. The agents handcuffed Pinney and placed him under arrest for making false statements. The agents did not advise him of his *Miranda* rights upon arrest.

Pinney states that on the way to the DEA/HIDTA headquarters, the agents in the car told Pinney if he gave them his own cell

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<sup>1</sup> It is unclear whether the agents had the phone records from December 6, 2005. However, the resolution of this factual dispute is not pertinent to this motion.

phone along with Serieux's cell phone, they would let him go. Agent Goldfinger states the deal was if Pinney could prove he had not had contact with Serieux, they would let him go. Pinney indicated his cell phone was at Ms. Hunt's apartment. The agents returned to Hunt's residence with Pinney to find his cell phone. Hunt searched the apartment at Pinney's direction, who was handcuffed at the time, but the phone was not found.

Pinney then stated Serieux's cell phone was at Pinney's home. Pinney directed the agents to his apartment to get Serieux's cell phone to prove he had not been in contact with Serieux. Still handcuffed, Pinney told the agents which key<sup>2</sup> to use to unlock the apartment he shared with his mother. Agent Goldfinger followed Pinney to his bedroom, opened the drawer Pinney indicated had his identification, and removed the identification. Pinney also gave Serieux's cell phone to Goldfinger.

While handcuffed in his kitchen, Pinney was questioned about why he had Serieux's cell phone. Goldfinger asked Pinney how to retrieve Serieux's voice mail, noting that the phone indicated there was only one message though Goldfinger himself had left a

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<sup>2</sup> The agents either obtained the keys from Pinney's person when they searched his person after the arrest, or the keys were found at Hunt's apartment when they returned to look for Pinney's phone.

number of voice mails on the phone. Pinney said he did not know how to retrieve messages and that he had loaned the phone to a friend and had just gotten it back.

Goldfinger left the kitchen while the other agents asked Pinney more questions about his contact with Serieux. When Goldfinger returned, he asked for consent to search his bedroom. Pinney did not answer and instead stated that he had already produced the phone in question and thus the charges should be dropped as agreed.

Then two agents placed Pinney in the front seat of the transport vehicle. Agent Joseph urged Pinney to continue cooperating and Agent Lee asked Pinney for consent to search his bedroom. Pinney verbally agreed. Agent Lee asked again to verify Pinney's consent. While Pinney refused to sign a written consent form to authorize the search, he gave oral consent to the agents.

While Pinney was handcuffed in the vehicle, the agents searched the bedroom. They found seven automatic firearms, six of which were fully loaded; numerous rounds of ammunition; two bullet proof vests; two baggies of suspected cocaine; one suspected black tar heroin; drug packaging material; and one suspected drug ledger. These items were removed from the house and Pinney was transported to the DEA/HIDTA headquarters where he was then read his *Miranda* rights.

At some time while the agents were searching Pinney's bedroom, Hunt phoned Goldfinger stating she had found Pinney's cell phone at her apartment. Two agents went to Hunt's apartment to retrieve the phone which had suffered significant water damage.

On January 10, 2006, the grand jury charged Pinney with seventeen counts. They include: felon in possession of firearms in violation of 18 U.S.C. § 922(g); unlawful possession of a Taser gun in violation of 14 V.I.C. § 2251(a)(1)(B)(b); unlawful possession of firearms in violation of 14 V.I.C. § 2253(a); unlawful possession of ammunition in violation of 14 V.I.C. § 2256; possession of more than five grams of cocaine in violation of 21 U.S.C. § 841; making a false statement in violation of 18 U.S.C. § 1001; felon in possession of body armor in violation of 18 U.S.C. § 931(a)(1); and use of a firearm in relation to a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1)(A)(i).

Pinney argues the agents violated his rights by subjecting him to custodial interrogation before reading him his *Miranda* rights. He also argues the agents violated his Fourth Amendment rights by conducting a warrantless search of his home. Thus he seeks suppression of all statements he made to the agents as well as all evidence seized by the agents from his home.

## II. ANALYSIS

### A. Custodial Statements in Response to Post-Arrest Interrogation

In *Miranda v. Arizona*, the Supreme Court held that the privilege against self-incrimination is jeopardized when an individual is taken into custody and subjected to interrogation. 384 U.S. 436, 478-79 (1966). Under these circumstances, an accused "must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored." *Id.* at 467. Any waiver of these rights must be made voluntarily, knowingly, and intelligently. *Colorado v. Connelly*, 476 U.S. 157, 169-70 (1986). The choice to abandon the rights requires "a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Moran v. Burbine*, 475 U.S. 412, 421 (1986). The Supreme Court has noted that reading an accused his *Miranda* warnings provides the accused with knowledge of the consequences of waiving these rights. *Patterson v. Ill.*, 487 U.S. 285, 294 (1988). Statements obtained in violation of *Miranda* cannot be used in the prosecutor's case in chief. *Miranda*, 384 U.S. at 479; see also *Harris v. New York*, 401 U.S. 222 (1971).

Because the United States concedes Pinney was in custody, the only remaining issue is whether he was interrogated. The term

"interrogation" refers to express questioning as well as "any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980). The term "incriminating response" includes "any response - whether inculpatory or exculpatory - that the prosecution may seek to introduce at trial." *Id.* at 302.

Between the time when Pinney was arrested and when he was finally read his *Miranda* rights, the agents asked Pinney a number of questions and acted in ways to elicit responses. For example, the agents asked Pinney to account for the number of messages on Serieux's phone and to explain why he had Serieux's phone. The agents also offered to drop the charges if he could prove his innocence and then asked Pinney how he could prove his innocence with the cell phones.

These inquiries were capable of eliciting incriminating responses. While the degree of incrimination of any such response is unclear, the violation of *Miranda* occurs regardless. *United States v. Orso*, 266 F.3d 1030, 1033 n.1 (9th Cir. 2001) (stating that the *Miranda* Court "admonished us not to try to discern 'degrees of incrimination'"). In sum, the agents' actions clearly constituted interrogation in violation of Pinney's *Miranda* rights and require suppression of his statements. See *United States v. Jacobs*, 431 F.3d 99, 114 (3d Cir. 2005)

(affirming suppression of defendant's statements made during a custodial interrogation when she was not informed of her *Miranda* rights).

**B. Physical Evidence Seized After Consent to Search**

Pinney argues the physical evidence seized, including the personal identification, the cell phones, and the evidence found in Pinney's room should be suppressed for two reasons. First, Pinney argues that the physical evidence was obtained after a violation of *Miranda*. Second, Pinney contends the physical evidence was seized after a warrantless search of his apartment undertaken without consent.

The United States Supreme Court has held that the remedy of suppressing evidence obtained in violation of *Miranda* does not extend to physical evidence. *United States v. Patane*, 542 U.S. 630, 643-44 (2004) (holding that because introducing the "nontestimonial fruit of a voluntary statement . . . does not implicate the Self-Incrimination Clause", the exclusion of unwarned but voluntary statements "is a complete and sufficient remedy for any perceived *Miranda* violation." (internal quotations omitted)). Therefore, the violation of Pinney's *Miranda* rights



will not necessarily result in the suppression of any physical evidence.<sup>3</sup> The Court's inquiry is not complete, however.

Given Pinney's claims that his consent to search was involuntary, the Court must determine whether the physical evidence obtained from the warrantless search was the product of a voluntary consent to search. The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures." U.S. Const. amend. IV. A warrantless search is considered unreasonable unless an appropriate exception applies, such as the defendant's consent. *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973).

Although Pinney did not respond to the first request to search his bedroom, the agents asked him for consent a second time after placing Pinney in the transport vehicle. This time Pinney gave permission.<sup>4</sup> On its face, it would appear that

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<sup>3</sup> The phone that Hunt provided to the agents was not obtained due to any search or seizure without a warrant. Hunt called the agents to let them know she had it and gave it to them. Thus, the phone from Hunt will not be suppressed.

<sup>4</sup> While Pinney urges this Court to suppress his statement of consent, the Court need not undertake a *Miranda* analysis because "a consent to search is not an incriminating statement." *United States v. McClellan*, 165 F.3d 535, 545 (7th Cir. 1999); see also *United States v. Rodriguez-Garcia*, 983 F.2d 1563, 1568 (10th Cir. 1993) ("Consenting to a search is not 'evidence of a testimonial or communicative nature' which would require officers to first present a *Miranda* warning."). Thus, Pinney's statement

Pinney's verbal permission to search was voluntary. However, this Court must look at the totality of the circumstances to determine whether consent is voluntary.

"In determining whether a defendant's will was over-borne in a particular case, the Court has assessed the totality of all the surrounding circumstances -- both the characteristics of the accused and the details of the interrogation." *Schneckloth*, 412 U.S. 218 at 226. Some factors to be taken into account include the age of the accused, his education, his intelligence, "the length of detention, the repeated and prolonged nature of the questioning, and the use of physical punishment . . ." and whether the defendant knew he had a right to refuse. *Id.* at 226-27 (internal citations omitted); see also *United States v. Watson*, 423 U.S. 411, 424 (1976) (holding consent was voluntary when there was no evidence of a threat of force, "no promises made to him," defendant was not a "newcomer to the law [or] mentally deficient," was given his *Miranda* warnings and gave consent on a public street).

Pinney is in his mid-thirties, a factor which weighs in favor of the government, as it is an age at which people are aware of the statements they make and the affect of such

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giving verbal consent to the agents to search his bedroom will not be suppressed.

statements. While Pinney was only in school through tenth grade, he later earned a General Equivalency Diploma. There is nothing on the record that indicates his intelligence is deficient.

Pinney had not been detained very long before he consented to the search. Even assuming it had been several hours since his arrest, it is not such an overwhelming period of time to suggest coercion. There was no physical coercion or display of force by the agents. There were no threats made nor any weapons brandished.

Pinney had previously been in prison for a ten-year term. This factor favors the government as Pinney clearly had some familiarity with the law.

At most, the only fact that favors the defendant is the notion that there was a quid pro quo agreement. This alone is not sufficient to require suppression.

### **III. CONCLUSION**

The agents failed to advise Pinney of his *Miranda* rights. Accordingly, Pinney's post-arrest statements made in response to the agents' inquiries, excluding those inquiries regarding administrative information and consent to search will be suppressed.

The physical evidence seized from Pinney's apartment will not be suppressed because Pinney's consent to search was freely and voluntarily given.

An appropriate order follows.

DATED: July 28, 2006

FOR THE COURT:

      /s/        
Curtis V. Gómez  
District Judge

ATTEST:

WILFREDO MORALES  
Clerk of the Court

By:       /s/        
Deputy Clerk

Copies to:

Hon. Geoffrey W. Barnard  
Delia Smith, AUSA  
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Carol C. Jackson  
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*For the defendant.*

**ORDER**

Before the Court is defendant Robert Pinney's ("Pinney")  
motion to suppress. The premises considered, it is hereby

**ORDERED** that the motion to suppress the statements made by  
Pinney after his arrest is **GRANTED**;<sup>5</sup> it is further

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<sup>5</sup> The statements suppressed by this order do not include those post-arrest statements made in response to administrative inquiries or any inquiries made to obtain consent to search.

**ORDERED** that the motion to suppress all physical evidence  
obtained is **DENIED**.

DATED: July 28, 2006

FOR THE COURT:

      /s/        
Curtis V. Gómez  
District Judge

ATTEST:

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Clerk of the Court

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